



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT  
P.O. BOX 2288  
MOBILE, AL 36628-0001

CE-SAM-RD-A

14 February 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023),<sup>1</sup> SAM-2023-0220-LML MFR #1 of #1<sup>2</sup>

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.<sup>3</sup> AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.<sup>4</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</sup> the Clean Water Act (CWA) implementing regulations published by the Department of the Army in 1986 and amended in 1993 (references 2.a. and 2.b. respectively), the 2008 *Rapanos-Carabell* guidance (reference 2.c.), and other applicable guidance, relevant case law and longstanding practice, (collectively the pre-2015 regulatory regime), and the *Sackett* decision (reference 2.d.) in evaluating jurisdiction.

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. The features addressed in this AJD were evaluated consistent with the definition of “waters of the United States” found in the pre-2015 regulatory regime and consistent with the Supreme Court’s decision in *Sackett*. This AJD did not rely on the 2023 “Revised Definition of ‘Waters of the United States,’” as

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<sup>1</sup> While the Supreme Court’s decision in *Sackett* had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

<sup>2</sup> When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, interstate water, or territorial seas that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</sup> USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable Alabama due to litigation.

1. SUMMARY OF CONCLUSIONS.

- a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States)
  - i. Wetland 1: Jurisdictional wetland with a continuous surface connection to a tributary; Section 404.
  - ii. Wetland 2: Non-jurisdictional wetland without a continuous surface connection to a tributary; Section 404.

2. REFERENCES.

- a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).
- b. Clean Water Act Regulatory Programs, 58 FR 45008 (August 25, 1993).
- c. U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008)
- d. *Sackett v. EPA*, 598 U.S. \_\_\_, 143 S. Ct. 1322 (2023)
- e. Mobile District's Section 10 waters list.

3. REVIEW AREA. The review area is comprised of approximately 7 acres of a forested and undeveloped parcel near the confluence of Norton Creek and Bayou Sara in Saraland. The approximate center point is at Latitude 30.808776, Longitude -88.06758; Saraland, Mobile County, Alabama.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is Bayou Sara which is on the Mobile District's Section 10 waters list.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS

Wetland 1 is a PFO which immediately abuts a grass swale / ditch, which holds water a more than 90 days of the year, that flows south along the eastern boundary of the subject parcel. The flow exits the subject parcel on the southeastern corner of the property via an approximately 65-foot, at surface grade open culvert and continues south for approximately 250 feet via a concrete lined ditch. Flow then continues downslope to the east, through a second approximately 65-foot at surface grade open culvert, to a county-maintained drainage easement with relatively permanent flow where high discharge events are evident (scouring). Flow continues east in this drainage easement for another 500 feet until encountering a final set of, at surface grade dual 3', culverts flowing downslope for approximately 390 feet before exiting to what surmounts to a man-made perennial waterbody (RPW). This man-made water body continues east until bending downslope to the north and exiting at Bayou Sara. This flow path is approximately 1.33 miles long (See Flow Path Overview Map).

Wetland 2 is a PFO which was more than likely isolated by development in the mid to latter half of the 20<sup>th</sup> century. It does not exhibit any surface connection to a TNW or RPW due to its depressional nature. Additionally, any potential TNW surface connection to the north as well as Wetland 1 is blocked by a berm. The ditched surface connection is blocked by sidecast from construction of the neighboring railroad line. The sidecast disrupts any continuous surface connection.

6. SECTION 10 JURISDICTIONAL WATERS<sup>6</sup>: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.<sup>7</sup>

N/A

7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States in accordance with the pre-2015 regulatory regime and consistent with the Supreme Court's decision in *Sackett*. List each aquatic resource separately, by name,

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<sup>6</sup> 33 CFR 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions.

<sup>7</sup> This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of “waters of the United States” in the pre-2015 regulatory regime. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.

- a. TNWs (a)(1): N/A
- b. Interstate Waters (a)(2): N/A
- c. Other Waters (a)(3): N/A
- d. Impoundments (a)(4): N/A
- e. Tributaries (a)(5): N/A
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): Wetland 1 (approximately 1.63 acres) originates on-site, but inside of the utility ROW where it extends southernly onto the parcel. It is connected to a TNW (Bayou Sara) via an immediately adjacent ditch to the east that exhibits a relatively permanent flow of water. This ditch drains through an approximately 1.3-mile series of open ditches and at surface-grade culverts which discharge into Bayou Sara, a TNW. Thus, Wetland 1 has a continuous surface connection to a TNW.

## 8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the review area identified as “generally non-jurisdictional” in the preamble to the 1986 regulations (referred to as “preamble waters”).<sup>8</sup> Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water.

N/A

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<sup>8</sup> 51 FR 41217, November 13, 1986.

- b. Describe aquatic resources and features within the review area identified as “generally not jurisdictional” in the *Rapanos* guidance. Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA based on the criteria listed in the guidance.

N/A

- c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste treatment system.

N/A

- d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.). Include the size of the aquatic resource or feature within the review area and describe how it was determined to be prior converted cropland.

N/A

- e. Describe aquatic resources (i.e. lakes and ponds) within the review area, which do not have a nexus to interstate or foreign commerce, and prior to the January 2001 Supreme Court decision in “*SWANCC*,” would have been jurisdictional based solely on the “Migratory Bird Rule.” Include the size of the aquatic resource or feature, and how it was determined to be an “isolated water” in accordance with *SWANCC*.

N/A

- f. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court’s decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

Wetland 2 (approximately 1.14 acres) is a palustrine forested wetland which is depressional in nature without a surface connection to a RPW, TNW, territorial sea, interstate tributary or jurisdictional impoundment. Wetland 2 is separated from Wetland 1 by an upland area as well as a berm created by sidecast from the construction of a railroad along the western portion of the property. Additionally, a

CE-SAM-RD-A

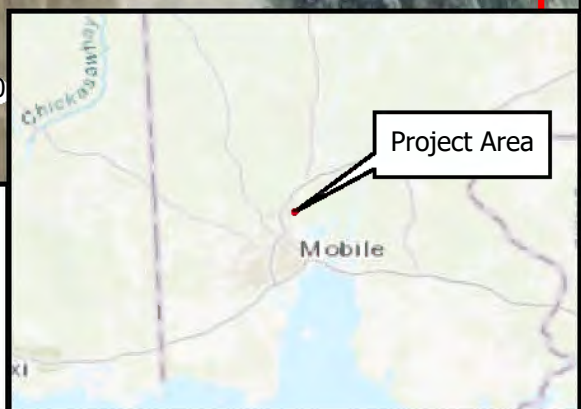
SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SAM-2023-0220-LML

ditch runs parallel to the berm and potentially connects to Wetland 1. However, the berm extends into this parallel ditch and severs surface connection of the ditch to Wetland 1.

9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
  - a. A field visit was conducted on 31 January 2024 as evidenced in the photolog included in the administrative record. Office evaluations were conducted through the months of November 2023, December 2023, and January of 2024.
  - b. "Wetland Delineation Report, ±7.0-Acres 701 Bill Myles Rd, Mobile County, AL; WSI Project #2022—519" dated 29 July 2022, prepared by Wetland Sciences Inc. (SAM-2023-00220-CDJ)
10. OTHER SUPPORTING INFORMATION. N/A
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.



Coordinate System: GCS WGS 1984  
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Lower Right Corner: 88.066131°W 30.807067°N  
Service Layer Credits: World Imagery: Maxar, Microsoft











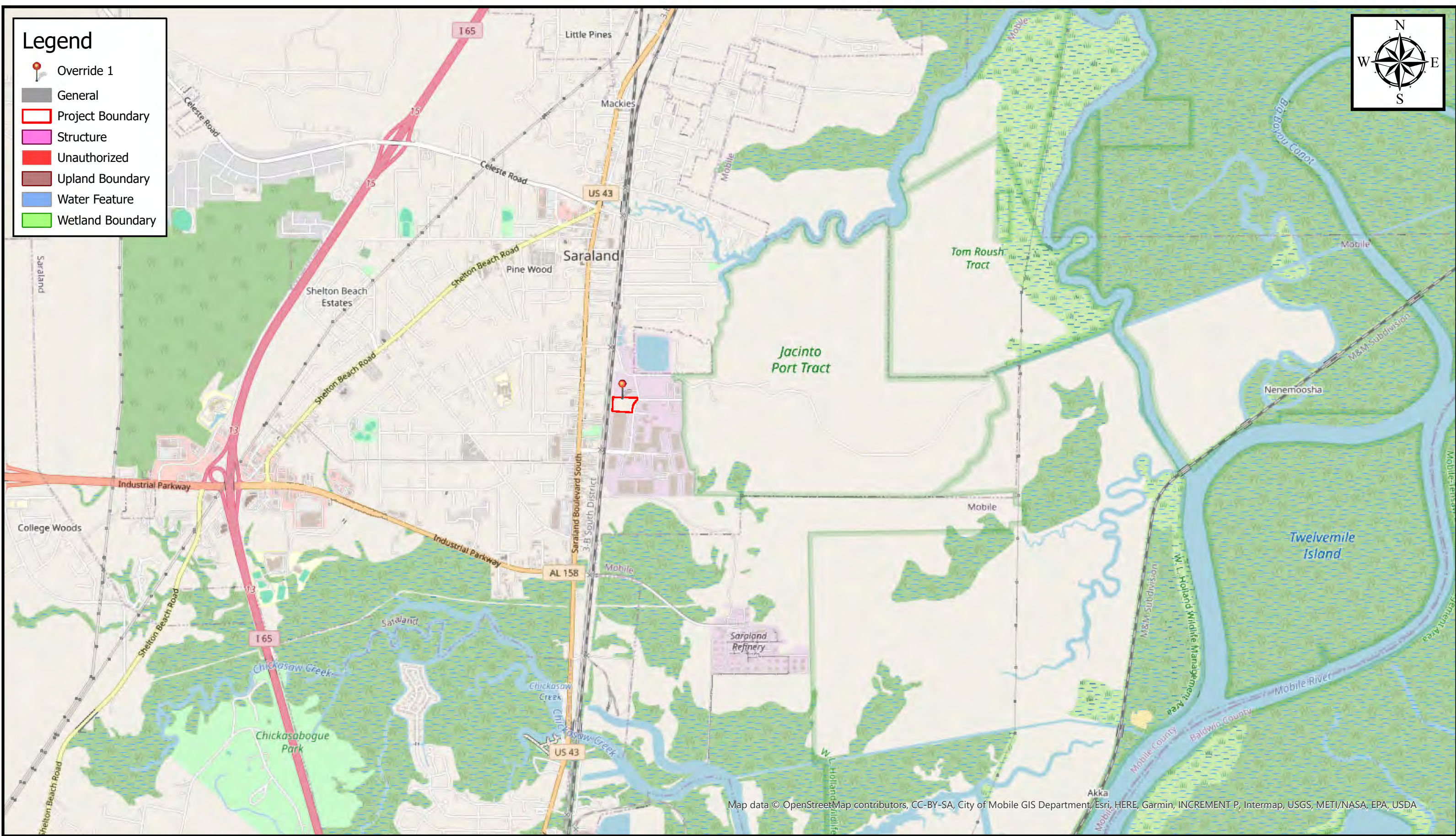
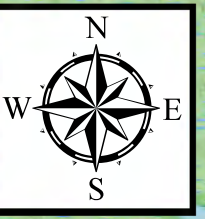
**Overview Index**  
**Department of the Army**  
**SAM-2022-00220-LML**

- Review Area Grid
- Review Area

Map generated on 2/5/2024 by the National Regulatory Viewer

# Legend

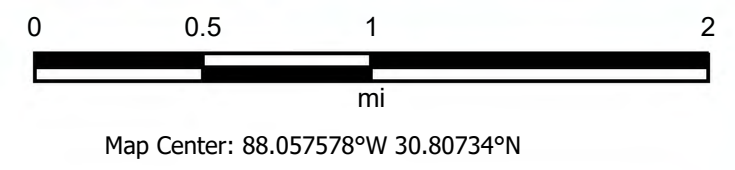
-  Override 1
-  General
-  Project Boundary
-  Structure
-  Unauthorized
-  Upland Boundary
-  Water Feature
-  Wetland Boundary



Map data © OpenStreetMap contributors, CC-BY-SA, City of Mobile GIS Department, Esri, HERE, Garmin, INCREMENT P, Intermap, USGS, METI/NASA, EPA, USDA



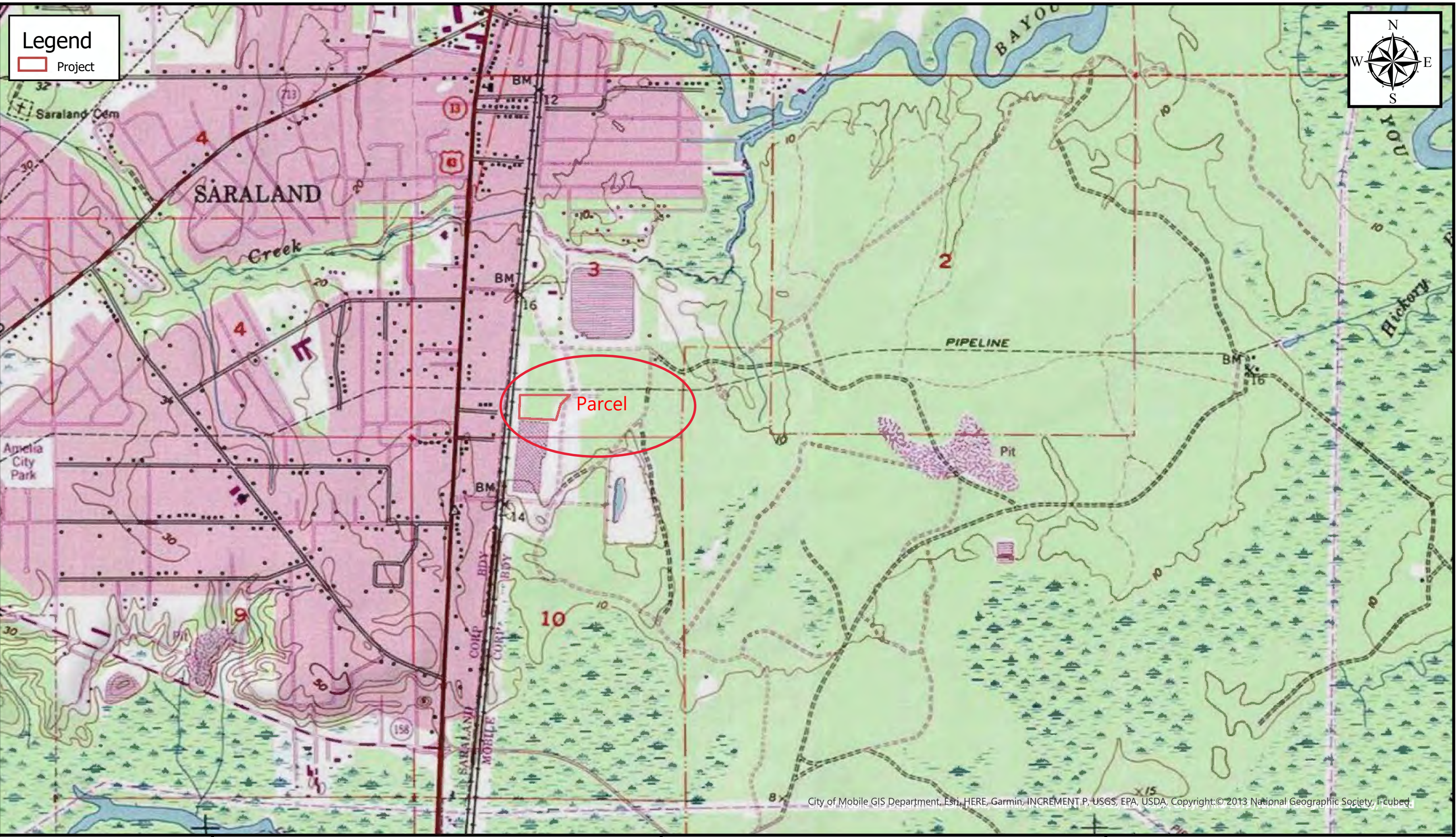
**Department of the Army // SAM-2022-00220 // Project Vicinity Map // Parcel Key: 02973704 Parcel ID: R022202033000006.002 Parcel Owner: MAGNETECH INDUSTRIAL C/O MCKINLEY SPARKS LLC 605 SE NORTHBRANCH DR WAUKEE, IA 50263**



Map Created by: M. Derek Jacobs  
Date: 2/12/2024  
Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere  
Projection: Mercator Auxiliary Sphere



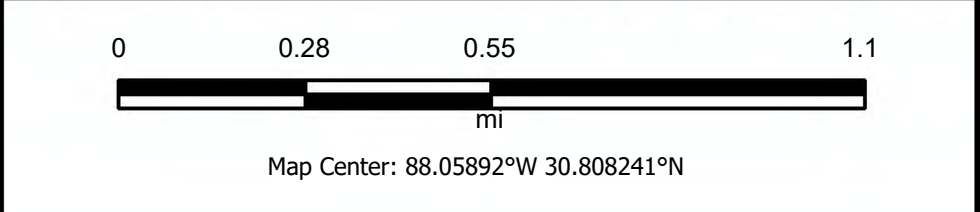
**Legend**  
Project



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Department of the Army // SAM-2023-00220-LML



Map Created by: M. Derek Jacobs  
Date: 1/4/2024  
Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere  
Projection: Mercator Auxiliary Sphere

# Wetland Overview Map










Map showing Wetlands, Uplands, & ditched RPW connection to TNW

## Legend

-  Culvert
-  Ditch
-  Feature 1
-  Concrete Lined Ditch
-  County Maintained Drainage Easement
-  Ditch
-  Saraland Town Center Park & Splash Pad
-  Upland or Sidecast Berm
-  Wetland



### Legend

-  Parcel
-  Estuarine and Marine Deepwater
-  Estuarine and Marine Wetland
-  Freshwater Emergent Wetland
-  Freshwater Forested/Shrub Wetland
-  Freshwater Pond
-  Lake
-  Other
-  Riverine

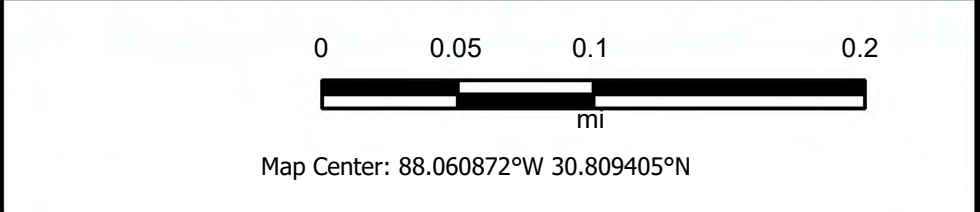


City of Mobile GIS Department, Esri, HERE, Garmin, INCREMENT P, USGS, EPA, USDA, Source: Esri, Maxar, Earthstar Geographics, and the GIS User Community



**SAM-2023-00220-LML**

**Department of the Army // SAM-2023-00220-LML**



Map Created by: M. Derek Jacobs  
Date: 1/4/2024

Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere  
Projection: Mercator Auxiliary Sphere

**Legend**

- Override 1

**National Hydrography Dataset (NHD)**

- Perennial
- Intermittent
- Ephemeral
- Artificial Path
- Canal Ditch
- Coastline
- Connector
- Pipeline
- Underground Conduit

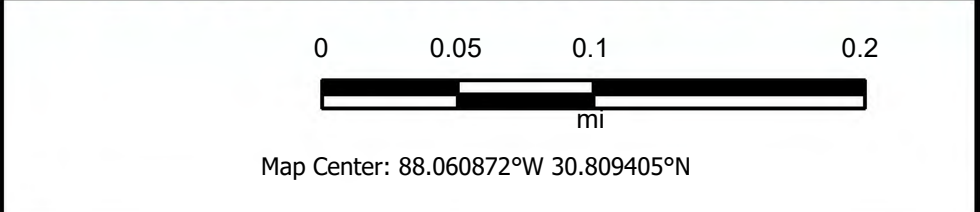


City of Mobile GIS Department, Esri, HERE, Garmin, INCREMENT P, USGS, EPA, USDA, USGS TNM – National Hydrography Dataset. Data Refreshed November, 2023, Source: Esri, Maxar, Earthstar Geographics, and the GIS User Community



**SAM-2023-00220-LML**

**Department of the Army // SAM-2023-00220-LML**

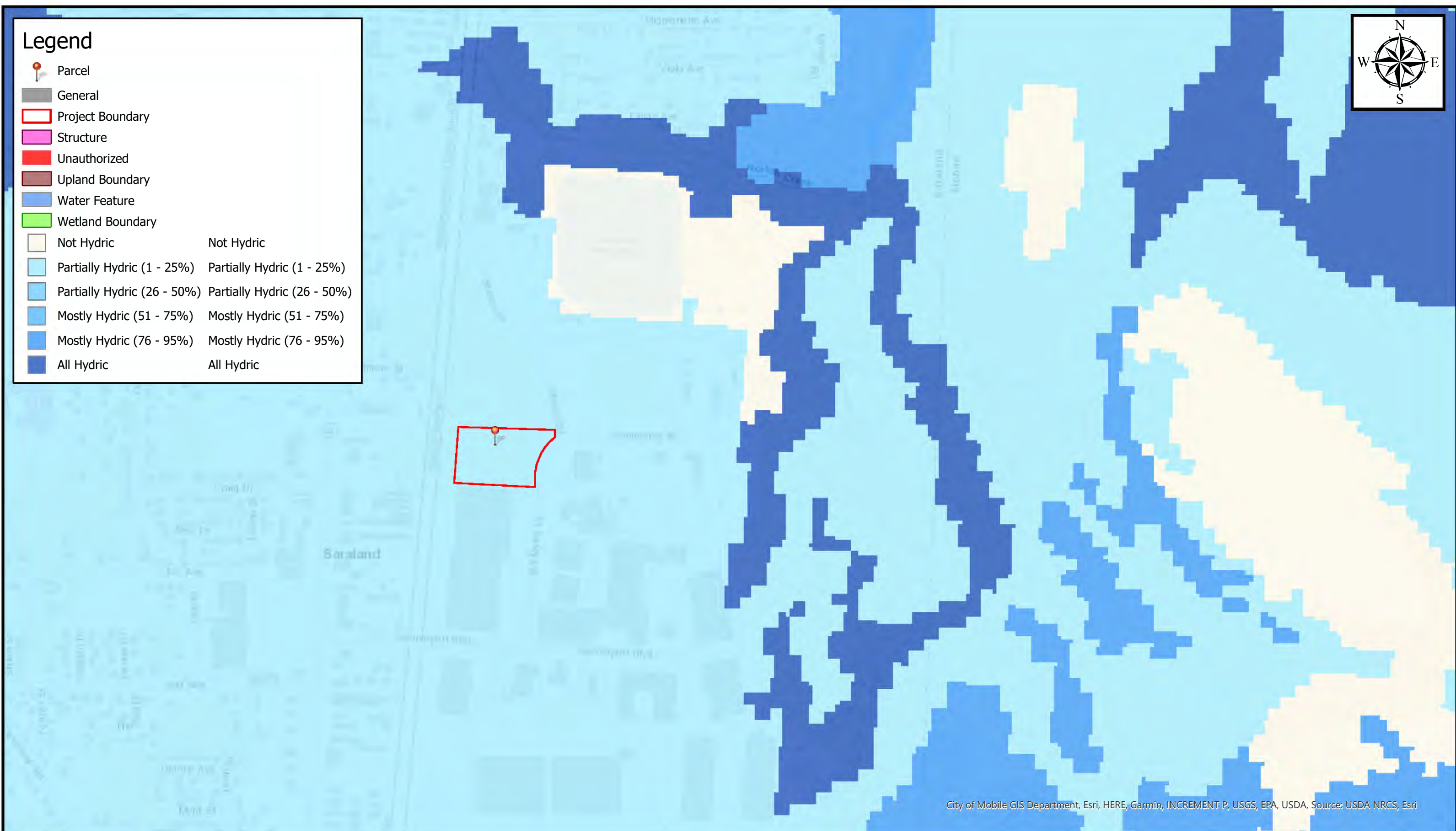


Map Created by: M. Derek Jacobs  
Date: 1/4/2024

Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere  
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# Legend

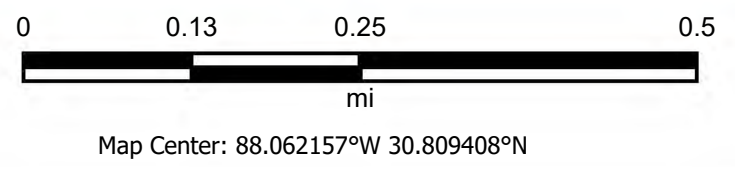
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- General
- Project Boundary
- Structure
- Unauthorized
- Upland Boundary
- Water Feature
- Wetland Boundary
- Not Hydric
- Partially Hydric (1 - 25%)
- Partially Hydric (26 - 50%)
- Mostly Hydric (51 - 75%)
- Mostly Hydric (76 - 95%)
- All Hydric



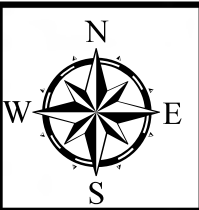
City of Mobile GIS Department, Esri, HERE, Garmin, INCREMENT P, USGS, EPA, USDA, Source: USDA NRCS, Esri



**SAM-2022-00220 // Hydric Soil Mapping**  
**Department of the Army // SAM-2023-00220-LML**



Map Created by: M. Derek Jacobs  
Date: 2/12/2024  
Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere  
Projection: Mercator Auxiliary Sphere



SAM-2023-00220-MDJ

Department of the Army // SAM-2023-00220-LML



Map Center: 88.06018°W 30.810325°N

Map Created by: Derek Jacobs


Date: 11/16/2023

Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere  
Projection: Mercator Auxiliary Sphere

# Flow Path Overview Map

Map showing Wetlands, Uplands, & ditched RPW connection to TNW

## Legend

-  Culvert
-  Ditch
-  Feature 1
-  Concrete Lined Ditch
-  County Maintained Drainage Easement
-  Ditch
-  Saraland Town Center Park & Splash Pad
-  Upland or Sidecast Berm
-  Wetland



## NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: Mobile County Commission	File Number: SAM-2022-00666-EAH	Date: 02/05/2024
Attached is:		See Section below
<input type="checkbox"/>	INITIAL PROFFERED PERMIT (Standard Permit or Letter of permission)	A
<input type="checkbox"/>	PROFFERED PERMIT (Standard Permit or Letter of permission)	B
<input type="checkbox"/>	PERMIT DENIAL WITHOUT PREJUDICE	C
<input type="checkbox"/>	PERMIT DENIAL WITH PREJUDICE	D
<input checked="" type="checkbox"/>	APPROVED JURISDICTIONAL DETERMINATION	E
<input type="checkbox"/>	PRELIMINARY JURISDICTIONAL DETERMINATION	F

### SECTION I

The following identifies your rights and options regarding an administrative appeal of the above decision. Additional information may be found at <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/appeals/> or Corps regulations at 33 CFR Part 331.

**A: INITIAL PROFFERED PERMIT:** You may accept or object to the permit

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **OBJECT:** If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the district engineer. Upon receipt of your letter, the district engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the district engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

**B: PROFFERED PERMIT:** You may accept or appeal the permit

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **APPEAL:** If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.



**C. PERMIT DENIAL WITHOUT PREJUDICE: Not appealable**

You received a permit denial without prejudice because a required Federal, state, and/or local authorization and/or certification has been denied for activities which also require a Department of the Army permit before final action has been taken on the Army permit application. The permit denial without prejudice is not appealable. There is no prejudice to the right of the applicant to reinstate processing of the Army permit application if subsequent approval is received from the appropriate Federal, state, and/or local agency on a previously denied authorization and/or certification.

**D: PERMIT DENIAL WITH PREJUDICE: You may appeal the permit denial**

You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

**E: APPROVED JURISDICTIONAL DETERMINATION: You may accept or appeal the approved JD or provide new information for reconsideration**

- **ACCEPT:** You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice means that you accept the approved JD in its entirety and waive all rights to appeal the approved JD.
- **APPEAL:** If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.
- **RECONSIDERATION:** You may request that the district engineer reconsider the approved JD by submitting new information or data to the district engineer within 60 days of the date of this notice. The district will determine whether the information submitted qualifies as new information or data that justifies reconsideration of the approved JD. A reconsideration request does not initiate the appeal process. You may submit a request for appeal to the division engineer to preserve your appeal rights while the district is determining whether the submitted information qualifies for a reconsideration.

**F: PRELIMINARY JURISDICTIONAL DETERMINATION: Not appealable**

You do not need to respond to the Corps regarding the preliminary JD. The Preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also, you may provide new information for further consideration by the Corps to reevaluate the JD.

**POINT OF CONTACT FOR QUESTIONS OR INFORMATION:**

If you have questions regarding this decision you may contact:

C. Dianne Jordan  
U.S. Army Corps of Engineers  
CESAM-RD-A  
Post Office Box 2288  
Mobile, Alabama 36628-0001  
Cynthia.D.Jordan@usace.army.mil  
251-510-1162

If you have questions regarding the appeal process, or to submit your request for appeal, you may contact:

Krista Sabin  
Regulatory Review Officer  
South Atlantic Division  
60 Forsyth St SW, Floor M9  
Atlanta, Georgia 30303-8803  
Krista.D.Sabin@usace.army.mil  
904-314-9631

**SECTION II – REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT**

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. Use additional pages as necessary. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

ADDITIONAL INFORMATION: The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15-day notice of any site investigation and will have the opportunity to participate in all site investigations.

_____ Signature of appellant or agent.	Date:
Email address of appellant and/or agent:	Telephone number: